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REPORT AND RECOMMENDATIONS MADE BY THE "D2" PANEL OF COMMISSIONERS CONCERNING PART TWO OF THE EIGHTH INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. This is the third report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") by the "D2" Panel of Commissioners (the "Panel"), one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) ("category 'D' claims").

2. This report contains the determinations and recommendations of the Panel in respect of part two of the eighth instalment of category "D" claims, comprising 229 claims ("the claims") of the 449 claims in the instalment, submitted to the Panel pursuant to article 32 of the Rules on 30 January 2001.

I. OVERVIEW OF THE CLAIMS IN PART TWO OF THE EIGHTH INSTALMENT

3. The 229 claims assert losses aggregating USD 309,393,235.63. Most of the loss types defined on the category "D" claim form were encountered in the claims. The most significant loss types appearing in the claims were D4 (personal property) and D7 (real property) losses.

4. Out of the 229 claims, 42 claims were deferred to later category "D" instalments, transferred from category "D" to category "E" or withdrawn. These included 27 claims which require further claim development, 8 shareholder claims which will be processed in accordance with Governing Council decision 123 (S/AC.26/Dec.123 (2001)), and 5 claims that overlap with other category "D" claims.

5. As a result of these deferrals and transfers, the number of claims reviewed by the Panel in part two of the eighth instalment was reduced to 188. Table 1 below sets out by submitting entity the claims in part two of the eighth instalment as submitted to the Panel and the claims as resolved by the Panel. 1/

Table 1. Summary of claims by submitting entity

Submitting entity	Number of claims submitted to the Panel	Number of claims resolved by the Panel
Canada	2	1
Egypt	3	3
France	2	2
India	16	15
Israel	8	8
Jordan	12	3
Kuwait	119	94
Lebanon	2	2
Pakistan	33	29
Spain	1	1

Submitting entity	Number of claims submitted to the Panel	Number of claims resolved by the Panel
Syrian Arab Republic	1	1
Tunisia	1	0
United Kingdom	9	9
United States	17	17
Yemen	2	2
UNHCR Canada	1	1
Total	229	188

II. THE PROCEEDINGS

6. On 25 July 2000, the Panel issued Procedural Order No. 5 in which it gave notice of its intention to complete its review of the claims and to finalise its report and recommendations to the Governing Council in two parts, part one in January 2001 and part two in August 2001. The Panel met regularly to review and consider the claims in this instalment.

7. The Panel has taken into consideration relevant information and views presented by a number of submitting entities and by the Government of the Republic of Iraq ("Iraq") in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.

8. The Panel has sought to achieve consistency, in so far as is possible, with the verification and valuation procedures adopted by other panels for category "D" and "E" claims. This has been accomplished by adapting the relevant features of related methodologies in the assessment of the claims, where appropriate.

III. LEGAL FRAMEWORK

A. Applicable law

9. The Security Council reaffirmed Iraq's liability under international law for any direct loss arising as a result of Iraq's invasion and occupation of Kuwait. Paragraph 16 of Security Council resolution 687 (1991) states that Iraq:

> "... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

10. Article 31 of the Rules identifies the law to be applied by panels of Commissioners in their consideration of claims. Specifically, panels are to apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for

particular categories of claims, and any pertinent decisions of the Governing Council. Where necessary, panels are to apply other relevant rules of international law.

B. Evidentiary requirements

11. Article 35(1) of the Rules provides that:

> "Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

12. Article 35(3) provides that claims in categories "D", "E" and "F" must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

13. In addition, decision 15 of the Governing Council expressly requires "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" with respect to "all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income producing properties." 2/

14. The Panel has reviewed the claims and made its recommendations by assessing documentary and other appropriate evidence provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has sought to balance the interests of claimants with the requirement that Iraq is only liable for direct loss, damage or injury caused by the invasion and occupation of Kuwait.

C. Causation

15. Security Council resolution 687 (1991) establishes Iraq's liability for any "direct" loss arising as a result of its invasion and occupation of Kuwait. The Panel has been particularly concerned to ensure that all losses recommended for compensation are direct losses caused by Iraq's invasion and occupation of Kuwait.

16. In dealing with the issue of causation, the Panel has been guided by Governing Council decision 7, which provides that compensation is available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage taking or other illegal detention. 3/

17. The Governing Council has confirmed that these guidelines are not intended to be exhaustive. 4/ For each claim, the Panel's causation analysis begins with reference to Security Council resolution 687 (1991), and an assessment of whether the claimed loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel has interpreted Security Council resolution 687 (1991) in accordance with the guidance provided by relevant decisions of the Governing Council. In each case, therefore, the Panel assesses whether the directness requirement has been met based on one of the enumerated circumstances outlined in paragraph 6 of decision 7, or some other causal relationship arising directly from Iraq's invasion and occupation of Kuwait. If a claim or a loss element fails to meet the directness requirement, the Panel recommends no compensation for that claim or loss element.

18. Additionally, the Panel has considered the decisions of other panels of Commissioners dealing with analogous issues of causation. In particular the Panel has drawn upon and adapted the reasoning applied by the "E2" Panel in its report concerning the second instalment of category "E2" claims with regard to the jurisdiction over losses outside of Kuwait. 5/ The Panel has also been guided by paragraph 23 of the report of the "F3" Panel concerning the first instalment of category "F3" claims with regard to what constitutes "direct" loss. 6/

D. The role of the Panel

19. The Governing Council has entrusted three tasks to the Panel. First, the Panel must determine whether an alleged loss falls within the jurisdiction of the Commission and is compensable in principle. Second, the Panel must verify whether the loss was actually suffered by the claimant. Third, the Panel must determine the amount of any compensable loss suffered by the claimant and recommend an award in respect thereof.

20. Taking into account the evidentiary and causation requirements that must be met by claimants in category "D", and considering the legal principles that must be respected in the valuation of compensable losses, a case-by-case assessment of each claim is required. In summary, the Panel's objective was to review the claims by applying established principles in a consistent and objective manner.

IV. FACTUAL AND LEGAL ISSUES ARISING IN THE DETERMINATION OF THE CLAIMS IN PART TWO OF THE EIGHTH INSTALMENT

21. The Panel was called upon to address numerous factual and legal questions in the determination of the claims. The Panel does not deem it appropriate to compile an exhaustive list of those issues and the determinations made in respect of each. Instead, the Panel has elected to limit itself to two specific issues, which are discussed below.

A. D8/D9 individual business losses: related or competing claims for the ownership of a business

22. The Panel considered two claims which presented D8/D9 tangible property and lost income claim elements in respect of certain businesses. Upon review, the Panel determined that the two claimants had filed competing claims in respect of certain of those businesses.

23. The Panel directed that detailed claim development be undertaken as to the ownership history of the businesses in question, and concluded that a domestic legal dispute existed regarding certain of these businesses. Following additional claim development, the Panel determines that the claimants shared joint ownership as of 2 August 1990, and therefore recommends that the claimants share equally in the compensation awarded.

B. D8/D9 individual business losses: directness of loss

24. The Panel also considered a claim seeking lost profits in connection with a patent that the claimant had secured in July of 1986, over four years before Iraq's invasion and occupation of Kuwait. The claimant alleged that his ability to exploit the patent was prevented by Iraq's destruction of documents and systems related to the patented device.

25. Following review, the Panel recommends that no compensation be awarded for this claim because the claimant has not established that the losses claimed were a direct result of Iraq's invasion and occupation of Kuwait.

V. CROSS-CATEGORY ISSUES

A. Overlapping and stand alone claims

26. The Panel has initiated an investigation of the nature and scope of the potential overlap of claims filed by individual claimants in category "D" and claims for compensation in respect of the same losses filed by Kuwaiti corporate claimants in category "E4". This potential overlap issue, in addition to the issue of stand alone shareholder claims, is being assessed in co-operation and consultation with the "D1", "E4" and "E4A" Panels. Pending the results of these investigations, the Panel has decided to defer eight claims in part two of the eighth instalment submitted by non-Kuwaiti shareholders of Kuwaiti corporate entities where a potential overlapping or stand alone claim has been filed.

B. Deductions of category "A", "B" and "C" awards

27. Recommended awards in respect of the claims in this instalment are reported after deduction of category "A", "B" and "C" approved awards made to the same claimants. In some cases, the deduction of a category "C" award constitutes a deduction of a pro-rated amount. This occurs where there are multiple category "C" loss elements, and the "C" award was capped at USD 100,000. In such cases, the "C" award is pro-rated back to the "C" loss elements to reach an amount that can be deducted from the corresponding category "D" award.

VI. OTHER ISSUES

A. Currency exchange rate

28. The Commission issues its awards in United States dollars. The Panel determines the appropriate exchange rate applicable to claims expressed in other currencies. The Panel finds that it is not possible to calculate the exchange rate separately for each individual claim. The Panel accordingly adopts the reasoning of the "D1" Panel on this issue. 7/ For claims stated in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange in effect immediately prior to Iraq's invasion and occupation of Kuwait (i.e., 1 August 1990) for converting Kuwaiti dinars into United States dollars. For claims stated in currencies other than Kuwaiti dinars or United States dollars, the currency exchange rate to be applied is the average rate in effect for the month of August 1990 for converting those currencies into United States dollars as indicated in the United Nations Monthly Bulletin of Statistics.

B. Interest

29. In decision 16 (S/AC.26/1992/16), the Governing Council specified that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award."

30. For category "D" loss types other than D8/D9 individual business losses, the "the date the loss occurred" under Governing Council decision 16 is 2 August 1990 (the date of Iraq's invasion and occupation of Kuwait). Category "D" claims for loss of business income are for losses of income that would have been earned over a period of time. As such, an interest start date of 2 August 1990 for such losses would result in over-compensation for claimants. The Panel accordingly adopts the midpoint of the period for which loss of business income claims have been recommended for compensation as the date of loss for the purpose of calculating interest.

C. Claim preparation costs

31. A number of category "D" claimants have made claims for claim preparation costs incurred by them, either in amounts specified on the claim form or in general terms. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claim preparation costs.

VII. RECOMMENDED AWARDS

32. Table 2 hereto lists the awards recommended by the Panel for each Government and international organization with claimants included in part two of the eighth instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from table 2 below, the Panel recommends a total of USD 32,745,106.63 against a total claimed amount of USD 89,113,869.66 for the 188 claims resolved in this part of the instalment.

Table 2. Recommended awards by submitting entity

Country	Number of claims recommended for payment	Number of claims not recommended for payment	Amount of compensation claimed (USD)	Amount of compensation recommended (USD)
Canada	0	1	141,787.25	0
Egypt	2	1	1,832,223.34	87,365.48
France	0	2	1,719,395.61	0
India	9	6	19,027,543.43	374,120.74
Israel	3	5	3,031,008.00	137,340.72
Jordan	2	1	2,804,349.78	399,302.00
Kuwait	92	2	42,687,755.59	29,016,844.38
Lebanon	2	0	346,421.00	202,249.00
Pakistan	25	4	6,344,134.93	1,631,207.79
Spain	0	1	1,852,175.00	0
Syrian Arab Republic	1	0	188,927.34	66,326.56
Tunisia	0	0	0	0
United Kingdom	5	4	2,887,371.32	183,371.22
United States of America	12	5	2,317,642.53	472,602.69
Yemen	2	0	3,814,533.00	144,432.00
UNHCR Canada	1	0	118,601.55	29,944.05
Total	156	32	89,113,869.66	32,745,106.63

33. The Panel respectfully submits this report pursuant to article 38(e) of the Rules, through the Executive Secretary of the Governing Council.

Geneva, 30 August 2001

(Signed) K. Hossain
Chairman

(Signed) N. Elaraby
Commissioner

(Signed) I. Suzuki
Commissioner

Notes

1/ The "D2" Panel of Commissioners executed Procedural Order No. 13 to acknowledge the withdrawal of one claim from part two of the eighth instalment of category "D" claims. Formally withdrawn claims such as this are noted as "resolved" for Panel report purposes.

2/ S/AC.26/1992/15, paras. 5 and 10.

3/ S/AC.26/1991/7/Rev.1, para. 6.

4/ Decision 7, paragraph 6 and decision 15, paragraph 6.

5/ "Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'E2' claims", S/AC.26/1999/6.

6/ "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'F3' claims", S/AC.26/1999/24.

7/ "Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US$ 100,000 (category 'D' claims)", S/AC.26/1998/1, paras. 61-63.

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REPORT AND RECOMMENDATIONS MADE BY THE "D1" PANEL OF COMMISSIONERS CONCERNING PART TWO OF THE NINTH INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. This is the twelfth report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure 1/ (the "Rules") by the "D1" Panel of Commissioners (the "Panel"), being one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) (category "D" claims). This report contains the determinations and recommendations of the Panel in respect of part two of the ninth instalment claims submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules on 31 July 2000.

2. The Panel divided the ninth instalment, which originally comprised 522 claims, into two parts. In part one of the ninth instalment, there were 244 claims. 2/ Of the 278 claims remaining to be reviewed in part two of the instalment, 23 were not reviewed for the following reasons. Twenty-one claims were deferred out of the instalment because they require further claim development or further review by the Panel. Two claims were transferred for review by the "D2" Panel of Commissioners because they were related to claims under its review. As a result of deferral and transfer, the number of claims resolved in part two is 255.

3. The Panel began its review of both parts of the ninth instalment on 31 July 2000. In addition to the meetings between July 2000 and January 2001 referred to in the Panel's report and recommendations concerning part one of the ninth instalment, the Panel held regular, further meetings at the Commission's headquarters in Geneva on the following dates to discuss claims in part two of the instalment: 29-31 January 2001, 19-21 March 2001, 14-17 May 2001, 25-27 June 2001 and 30 July-2 August 2001. These meetings included joint meetings with the "D2" Panel in January, March and May 2001 to discuss issues of relevance to both Panels.

4. The claims in part two of the ninth instalment comprised all loss types that can be claimed in category "D." 3/ The following table sets out the number of claims by submitting entity in part two of the ninth instalment.

Summary of claims by submitting entity

Submitting Entity	Number of claims as submitted to the Panel	Number of claims resolved by the Panel
Australia	2	2
Canada	4	3
France	2	2
Germany	1	0
Iceland	1	0
India	21	20
Ireland	2	2
Israel	1	1

Submitting Entity	Number of claims as submitted to the Panel	Number of claims resolved by the Panel
Italy	1	0
Jordan	59	58
Kuwait	130	115
Netherlands	1	0
Pakistan	5	5
Sudan	7	7
Sweden	3	3
Syrian Arab Republic	13	13
Turkey	1	0
United Kingdom	14	14
United States	3	3
Yemen	1	1
UNDP Washington	1	1
UNHCR Canada	2	2
UNRWA GAZA	3	3
Total	278	255

I. BACKGROUND

A. Background information

5. In reviewing the claims in part two of the ninth instalment, the Panel has taken into account the factual background relating to Iraq's invasion and occupation of Kuwait, as set out in detail in its reports on part one and part two of the first instalment of category "D" claims. 4/

6. The Panel has also taken into consideration other relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has considered information and views presented by the Government of the Republic of Iraq ("Iraq") and other Governments in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.

B. General legal framework

7. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's report and recommendations concerning part one of the first instalment of category "D" claims. 5/

C. Applicable evidentiary standard

8. The evidentiary standard to be applied in reviewing category "D" claims was previously addressed by the Panel in its previous reports. 6/ As with previous instalments, the Panel has reviewed

the claims in part two of the present instalment in accordance with Article 35 of the Rules, and made its recommendations by assessing documentary and other appropriate evidence, as well as by balancing the interests of claimants who had to flee a war zone with the interests of Iraq which is liable only for any direct loss, damage or injury as a result of its invasion and occupation of Kuwait.

II. NEW ISSUES ARISING IN THE APPLICATION CLAIMS

9. Some of the claims in part two of the ninth instalment raise new issues that were not dealt with in the Panel's previous reports. These new issues and the Panel's findings and recommendations with respect thereto are set out below.

A. D8/D9 (business loss) issue

10. A fisherman in Kuwait filed a claim for D6 (loss of income) which was recategorized to a D8/D9 claim for loss of income. The claimant owned seven fishing boats, and sought compensation for loss of income from his fishing activities from the date of the invasion to 14 September 1991, approximately thirteen and a half months. The claimant's evidence established the existence of the business, the fact of loss and the directness of the loss. The claimant stated that his boats and fishing activities were based in the Al Doha area. He also stated that he was unable to resume his fishing activities until 14 September 1991 because of land and sea mines in the area. The presence of mines in the area was confirmed by a map prepared by a Kuwaiti government agency, which displayed areas mined by Iraqi forces.

11. The Panel has previously determined that a claimant is limited to compensation for 12 months of lost income (from 2 August 1990) if the business resumed, unless there is an extraordinary reason that prevented the claimant from resuming his business within that period. 7/ The Panel concludes that the presence of mines in the fishing area is an extraordinary reason, which prevented the resumption of the claimant's business within 12 months of Iraq's invasion and occupation of Kuwait. The Panel recommends that the claimant be compensated for his loss of income for the entire period of thirteen and a half months during which he was unable to conduct his fishing activities.

B. D (other) issue: losses arising out of the loss of intangible property

1. Introduction

12. A number of claims in category "D" seek compensation for losses of intangible property. Such claims typically arise in connection with the destruction or loss of particular types of property such as drawings, blueprints, computer software, compilations of data, manuscripts, scientific or other research data, professional aides including teaching materials, photographs, artistic or other rights. The Panel has not yet had occasion to review loss of traditional intellectual property rights comprising trademarks, copyright and patents.

13. Claimants typically assert one or more of the following kinds of loss or damage: the destruction or loss of tangible items; the loss of information embodied in items of tangible property; and the loss of professional opportunity or standing. For example, an author may seek compensation for the destruction or loss of unpublished manuscripts. A scientist may seek compensation for the loss of intermediate or final results of research. An academic may seek compensation for the loss of information or research, which would have led to professional enhancement.

14. Given the diverse nature of the claims, the Panel has found it difficult to apply any precise methodology to every kind of loss arising out of the loss of intangible property. However, as with the other category "D" methodologies, a claimant must satisfy the ownership, loss and causation test for all aspects of a claim involving the loss of intangible property. Thus, a claimant must establish ownership of the intangible property, or the right to use or exploit it. A claimant must establish loss of the intangible property, but because of the nature of intangible property, a claimant must also show that the lost property is not available elsewhere, i.e. there is no physical or electronic copy accessible elsewhere; and that it cannot be recreated or restored or can only be recreated or restored involving considerable time and expense. A claimant must of course establish that the loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel will assess the facts in each claim taking into account the nature of the property and will recommend an appropriate award generally applying the guidelines set out hereafter.

2. Loss of tangible property

15. Such tangible property would include all chattels such as books, computers, laboratory equipment, or other items used for research or storing data. To the extent that this kind of loss falls within personal property or other existing appropriate methodologies, the Panel will apply these methodologies.

3. Loss of information, data or rights

16. A loss of information may arise where information was lost that can be distinguished from the information carrier, i.e. the tangible item. For example, the information in source code for software is distinct from a disk; the recording of a musical performance is distinct from the tape or compact disc embodying the recording; the partial or complete results of experiments in the course of scientific research are distinct from the laboratory equipment in which they are contained. In such cases, claimants must establish that they owned the information or were entitled to its economic value including any rights attached to it. In that regard, the Panel will examine any evidence that addresses the existing or potential commercial value of the information. The Panel will employ a rebuttable presumption that the person who commissioned the work by the claimant, or the employer of the claimant, is entitled to all scientific and technological information or data created in the course of the commission or the employment. Where, however, the intangible property is in the nature of a literary, musical or artistic work or scientific data, and such property is created by a person independent of any commission or employment, that person would prima facie be regarded as entitled to any award of compensation for the loss of such property.

17. In valuing claims for the loss of information (including data or rights), the Panel will consider whether it had commercial value. In cases where the information had no commercial value, or no commercial value is established, but where it was used by the claimant in the course of his or her business or occupation and its creation involved significant time and effort, the Panel will value the loss on the basis of the reasonable cost of the claimant's time and labour in producing it. In such cases, the Panel will generally recommend an award of three months of the claimant's annual income as at the date of loss for each year that the claimant spent compiling the information or other intangible property in the first instance, up to a maximum of nine months' income, or on a lump sum basis where the claimant has not provided proof of income but has otherwise established ownership, loss and causation. In cases where the information was compiled merely as a hobby or recreational pastime, the Panel will recommend a discretionary award of compensation in a fixed sum up to USD 2,500 for the loss of information.

4. Loss of professional standing or opportunity

18. Claimants sometimes assert that the loss of the tangible item and/or loss of information damaged their professional standing or opportunity. An example of this type of claim is where a professor claims that he or she would have had an enhanced professional standing if he or she had been able to continue research that was destroyed as a direct result of Iraq's invasion and occupation of Kuwait. In addition to satisfying the ownership, loss and causation test applicable to all aspects of a claim involving intangible property, a claimant must also establish the relationship between the lost or destroyed property and the loss of professional standing or opportunity, taking account of the claimant's professional qualifications. The Panel will recommend an appropriate award in such cases taking account of all the relevant circumstances of each case.

5. The Claims

19. Some of the particular claims considered by the Panel in part two of the ninth instalment are discussed below.

(a) Claim 1

20. A claimant alleged that he was the creator and owner of certain computer software packages, which were used for business automation and sold to small businesses in Kuwait. The claimed losses included the loss of software packages in the amount of USD 388,519.03, the loss of income in the amount of USD 193,771.63 and the loss of trade secrets in the amount of USD 128,103.81. The claimant produced evidence, including U.S. copyright registration certificates, to establish the existence and ownership of the software packages. However, the claimant did not provide any evidence establishing the commercial value of the software packages or the income generated by them. The claimant also submitted unaudited financial statements, but they did not state the amount of

income, if any, attributable to the various packages. The claimant did not provide any evidence that his trade secrets had been used by a third party.

21. The Panel views this claim as a claim for loss of information, as described in paragraph 16 above. The Panel finds that the claimant has established ownership of the property. However, the claimant must also establish the loss of the software. The Panel finds that the claimant has failed to establish loss of the software because the claimant failed to establish that the information was not recoverable from other sources. The claimant also did not prove loss of income, or a commercial value for the software. Therefore, the Panel finds that the claimant did not establish the loss of the intangible property itself and did not establish the amount of the financial loss resulting from the claimed loss of property. Moreover, there is no evidence of loss of trade secrets. Accordingly, the Panel recommends that no compensation be awarded for this portion of the claim.

(b) Claim 2

22. A claimant was employed by a private research centre in Kuwait until December 1990. He claimed that he was conducting his own research project involving the processing of the Arabic language and speech by computer, and that he developed numerous algorithms and software for this purpose. He submitted a claim for the loss of his research in the amount of USD 150,000. The claimant asserted that he had worked on this project on his own time over a period of six years during which he had spent approximately 35 hours per week on the project. The evidence included third party witness statements, which indicated the witnesses saw the claimant working on the research in his home and that the claimant demonstrated a computer in his home that could speak Arabic. The evidence also established that there had been no attempt to realize commercial benefits at the time of the loss. The claimant held a PhD degree in electrical engineering. His employment history included posts as a telecommunications engineer and an assistant professor in computer-related fields. He had 13 published papers and conducted research into speech technology at a private research centre. The claimant stated that his career was adversely affected because there were publications he would have been able to complete had his research not been lost. He had not had any publications in the ten years since Iraq's invasion and occupation of Kuwait, and believed that his lost research would have yielded numerous publications in that time.

23. The Panel finds that the claimant has established the existence of the research, his ownership of it and its loss as a direct result of Iraq's invasion and occupation of Kuwait. However, the Panel finds that the claimant failed to prove that it had any commercial value. The Panel also finds that the nature of the claimant's research and its potential commercial benefits were speculative. Therefore, the Panel recommends no award pursuant to the guidelines in paragraph 17. The Panel finds that the claimant's loss is more appropriately characterized as a loss of professional opportunity or standing. The Panel finds that the ownership, loss and causation test has been met regarding the materials giving rise to damage to or loss of professional standing or opportunity. Taking account of the claimant's professional qualifications, the Panel finds that the claimant's career was damaged as a result of the loss of his research, notwithstanding the absence of evidence as to a commercial value. Applying the

above guidelines, the Panel recommends an award of USD 30,000 for loss of professional standing or opportunity.

(c) Claim 3

24. A claimant was an established writer in Kuwait who sought compensation in the amount of USD 1,903,114.19 for the loss of six manuscripts. The writer had 18 previously published books. The existence of at least one of the lost manuscripts was confirmed by a statement from a printer who stated that a manuscript had been delivered by the claimant but was destroyed during Iraq's invasion and occupation of Kuwait. The printer also stated that the claimant paid for the printing of 3,000 copies of the manuscript. The claimant was unable to provide evidence to establish the commercial value of the lost manuscripts.

25. The Panel finds that the claimant has established the existence of the manuscripts, his ownership of them, and their loss as a direct result of Iraq's invasion and occupation of Kuwait. However, the Panel finds that the claimant has failed to establish that the manuscripts had commercial value. There was also no evidence regarding sales or revenues generated by the lost works or any of the claimant's other works. Although there is no evidence of commercial value or the claimant's income, the claimant has proved the existence, ownership and loss of the manuscripts, and the Panel recommends an award of USD 10,000 for loss of manuscripts.

(d) Claim 4

26. A claimant, who was an expert landscaper, sought compensation for notes, papers and a manuscript about landscaping, which were lost during Iraq's invasion and occupation of Kuwait. The claimant stated that there was no witness who could confirm the existence of the notes, papers and manuscript. He also stated that he had not contacted any publisher regarding the publication of the manuscript.

27. The Panel finds that the claimant has not established the existence, ownership or loss of the claimed items. Accordingly, the Panel recommends that no compensation be awarded.

(e) Claim 5

28. A claimant sought compensation in the amount of USD 10,380.62 for the loss of a music recording. At the time of Iraq's invasion and occupation of Kuwait, the claimant was employed as a part-time English language instructor. He stated that he recorded a tape in 1980 with a well-known rock band and that he had the right to release it. His claim was for the lost sales that he alleged would have been derived from the recording, and for the damage to his musical career. The claim was supported by a witness statement, which confirmed the recording of the tape by the claimant.

29. The Panel finds that the claimant has established the existence of the recording, his ownership of it, and its loss as a direct result of Iraq's invasion and occupation of Kuwait. However, the Panel finds that, given the recording was made in 1980, it is reasonable to conclude that evidence of its commercial value would have become apparent by 1990. No such evidence has been provided. The Panel also finds that the recording was not created in the course of the claimant's business. Based on the absence of a commercial value, the age of the recording, and the fact that it was not created as part of the claimant's business, the Panel recommends no compensation for the lost recording.

(f) Claim 6

30. A claimant, who was an associate professor of biochemistry, sought compensation in the amount of USD 69,204 for the loss of teaching materials and USD 103,206 for the loss of unpublished research materials. He died in January 2000. His widow is now pursuing the claim. The claimant asserted that he was planning to use the teaching materials as a foundation for a textbook in general biochemistry for medical students. The claimant's widow indicated that the claimant had contacted a publisher about publishing a textbook. With regard to the lost research, he stated that he had established a research group on experimental diabetes, and that some of the findings of the group had been published in international journals. The research had generated data and specimens that were lost during Iraq's invasion and occupation of Kuwait. He asserted that he would have been able to generate additional publications from the lost research, and that such additional publications would have enhanced his professional standing. The evidence included witness statements from two professors and one doctor, which confirmed that the claimant was engaged in research of the type described in the claim and that the research was lost during Iraq's invasion and occupation of Kuwait. The claimant's educational and professional background included a PhD degree in Biochemical Endocrinology, eight publications and 22 papers. He had been a professor in biochemistry since 1977, but after the invasion and the loss of his research, he was unable to find employment between 1990 and 1995.

31. The Panel finds that the claimant has established the existence of the teaching materials as well as of the unpublished research materials, his ownership of them, and their loss as a result of Iraq's invasion and occupation of Kuwait. The Panel determines, however, that there is no evidence of a commercial value for the lost teaching and research materials. In the circumstances, the Panel recommends an award of USD 5,000 for the loss of such materials. The Panel also views this claim as one for loss of professional standing or opportunity. Taking account of the claimant's professional qualifications, the effect of the loss of the teaching and unpublished research materials as well as the fact that the claimant was unable to find employment for five years, the Panel also finds that the claimant suffered damage to his career and recommends an award of USD 50,000 for this loss.

(g) Claim 7

32. A claim was submitted by a professional photographer and cameraman, who sought compensation for lost films in the amount of USD 50,000, lost negatives of still photographs in the amount of USD 50,000, photographs in the amount of USD 5,000, and lost family photographs in the

amount of USD 30,000. The items were destroyed by an Iraqi Scud missile attack on Israel. The claimant also sought compensation for personal property losses and for personal injuries. The claimant was a television crew cameraman. He was a film director and certified still photographer. He obtained degrees in film and photography, and one of his films was included in a local film festival. Each of the lost films was identified by its title in the claim. The claimant did not itemize the lost negatives and photographs, but submitted a witness statement confirming the existence of lost negatives and photographs. There were also statements confirming that copies of the lost films, negatives and photographs did not exist. The claimant's income was approximately USD 2,000 per month at the time of the alleged loss.

33. The Panel finds that the claimant has established the existence and loss of the claimed items, and that the loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel also determines that the claimed items were used in the course of the claimant's business, and that the items were relevant to the claimant's professional standing. However, the Panel finds that there is no evidence of a commercial value for the lost items. In the absence of a commercial value, the Panel recommends an award of USD 16,500 based on three months of the claimant's annual income for each year that the claimant spent creating the lost items. With regard to the lost photographs, the Panel recommends an award of USD 2,500.

(h) Claim 8

34. A claim was submitted by a professor of civil engineering, seeking compensation for losses resulting from the disruption of research in Kuwait and from his inability to attend and give presentations at two scientific conferences (including compensation for 18 months spent preparing for the conferences). The disrupted research was a study of a novel type of foundation to be used for a building erected on soil with a low load bearing capacity. The research commenced in April 1988 and was scheduled for completion in March 1991. The claimant asserted that his career was harmed because: (a) his resume would have been enhanced by the completion of the research, (b) he would have generated two papers from the research, and (c) he anticipated that a patent would have been granted for the new type of foundation. However, the claimant also stated that there had been no attempts to generate a commercial value from the research. The claimant's professional background included a PhD degree in Engineering and publications in the areas of "Photoelasticity," "Integrated Photoelasticity," "Scattered Light Technique," "Photoacoustic Spectroscopy Technique," and "Structural Analysis." From 1977 to 1990, he held faculty positions at various universities in Europe and Kuwait. He was promoted to a full professor in April 1990. The claimant was unable to find employment between 1990 and 1995.

35. This is a claim for loss of information and loss of professional standing or opportunity as described in paragraphs 16 and 18 above. The Panel finds that the claimant has established the existence of the research, his ownership of it, and its loss as a direct result of Iraq's invasion and occupation of Kuwait; furthermore, that the lost research was used in the course of his career and that it was relevant to his professional standing. The Panel also finds that the claimant possessed the

professional qualifications for the lost opportunity or standing. Although there is no evidence that the lost research had commercial value, the Panel recommends an award of USD 17,500 for the lost research and loss of professional standing and opportunity.

III. PANEL DETERMINATIONS ON OTHER CLAIMS

A. D4 (personal property): claim for original works of art

36. There is one claim in part two of the ninth instalment that includes claims for original works of art submitted by an artist. Due to the unique nature of the claimed items, the Panel retained outside expert consultants to assist it in verifying and valuing the claim.

37. The artist submitted a claim for 36 paintings, which were lost or stolen during Iraq's invasion and occupation of Kuwait. Each painting was individually identified, and a value was provided for each. The paintings were described as portraying subject matter including landscapes and still life, and included several portraits such as commissioned portraits of Kuwaiti royal family members. Photographs of many of the paintings were included with the claim. The claimant submitted evidence to show that her works had been part of several exhibitions, including photographs of the exhibitions and press clippings regarding the exhibitions. Her works were exhibited in Paris, Rome, London, Tokyo, Moscow and throughout the Middle East. The artist was a member of the Kuwaiti Society for Formative Arts. That organization submitted a statement confirming the existence and loss of the paintings and the claimant's ownership of them. Additionally, the claimant submitted invoices and statements from a few purchasers of her artwork regarding the actual amount paid for her works.

38. The Panel finds that the claimant is a recognized artist in Kuwait. The claimant has stated that she has not sold any of her works outside of the Persian Gulf states. The market for her works is limited to that region. The artist produced many of her works for display at exhibitions, but production for exhibition purposes is not necessarily the same as production for sale purposes. The claimant provided some information in response to specific requests for documentation concerning the sales of her works. The claimant was not able to provide documentation for all the sales. There was evidence that nine of the paintings had been sold, but that the sales were not completed because of Iraq's invasion and occupation of Kuwait. The evidence also suggests that an additional six paintings would likely have been sold but for Iraq's invasion and occupation of Kuwait.

39. The Panel finds that the claimant established ownership and loss of the paintings, and that the loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that the claimant had contracted to sell nine of the paintings, and that the amount she would have realized from the lost sales is Kuwaiti dinars (KWD) 21,000 (USD 72,664.36). The Panel also finds that it is likely that she would have been able to sell an additional six paintings, and that the amount she would have realized from those sales would have been KWD 12,366 (USD 42,788.93). The Panel further finds that it is likely that the remaining 21 paintings would have remained unsold, and recommends an award of KWD 4,250 (USD 14,705.88) to compensate for the time spent in creating the paintings and

for the cost of materials. The Panel thus recommends a total award of USD 130,159.17 for the loss of the paintings.

B. D5 (loss of securities) issue

40. A claimant sought compensation for uncashed cheques. He stated that he provided money to non-Kuwaiti nationals to fund their jewellery businesses. Some of the repayments were in the form of the uncashed cheques received from the non-Kuwaiti nationals. The claimant was in Syria on the day of Iraq's invasion. He returned to Kuwait on 13 September 1990 and searched for the issuers of the cheques. He was informed that they had returned to their country of origin. He returned to Syria in October and did not return to Kuwait thereafter.

41. The Panel notes that there was no evidence of the claimant's efforts to find the debtors. Although he stated that he appointed an attorney-in-fact in Kuwait to pursue the matter, the claimant did not provide a statement from the attorney-in-fact. As the claimant failed to prove that the debtors died, disappeared or became bankrupt as a direct result of Iraq's invasion and occupation of Kuwait, the Panel recommends that no compensation be awarded.

C. D7 (real property) issue

42. A claimant owned a farm in the Al Abdali region of Kuwait. The claimant sought compensation for the costs of demolition and reconstruction of four chalets on the farm. However, the claimant stated that he could not start or undertake repair work because the farm was in a military zone. A witness statement confirmed that the region was the site of many battles, and another witness stated that Iraqi tanks destroyed the chalets on the farm. A map prepared by a Kuwaiti government agency confirmed that the farm was in a military zone and that the area had been mined.

43. The Panel finds that the location of the farm in a military zone that was mined provides an acceptable reason for not undertaking repairs. The Panel therefore recommends that no discount be applied to this claim.

IV. CROSS-CATEGORY ISSUES

44. Recommended awards in respect of claims in part two of this instalment are reported net of category "A", "B" and "C" approved awards made to the same claimants. 8/

V. OTHER ISSUES

A. Exchange rates

45. For purposes of calculating recommended amounts, the Panel has converted currencies into United States dollars in accordance with the rates set out in paragraphs 61-63 of its First Report.

46. In paragraph 39 of its Fifth Report, the Panel noted that where losses are claimed for money in currencies other than United States dollars and it is established that the application of the exchange rate approved by the Panel in its First Report "would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the losses suffered. In particular, this would be applied in situations where the claimant has submitted evidence that he or she purchased the money at a rate different from the rate adopted by the Panel." 9/

B. Interest

47. A number of claimants in part two of this instalment filed claims in category "D" specifically for interest on their category "D" claims. In its report and recommendations on part one of the first instalment, the Panel determined that interest will be awarded in accordance with Governing Council decision 16 (S/AC.26/1992/16). 10/

C. Claim preparation costs

48. A number of claimants in part two of this instalment have made claims for claim preparation costs incurred by them, either in amounts specified on the claim form or in general terms.

49. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claim preparation costs.

VI. RECOMMENDED AWARDS

50. The annex hereto lists the awards recommended by the Panel for each Government and international organization for the claims resolved in part two of the ninth instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the table, the Panel recommends a total of USD 42,993,424.55 against a total claimed amount of USD 105,592,403.05.

51. The Panel respectfully submits this report pursuant to article 38(e) of the Rules, through the Executive Secretary to the Governing Council.

Geneva, 30 August 2001

(Signed) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) M.C. Pryles
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ These claims were reported in the "Report and recommendations made by the 'D1' Panel of Commissioners concerning part one of the ninth instalment of individual claims for damages above USD 100,000 (category 'D' claims)" (S/AC.26/2001/10).

3/ In part one of the first instalment of category "D" claims, the Panel developed methodologies for the following loss types: D1 (money); D1 (mental pain and anguish) ("MPA"); D3 (death); D4 (motor vehicles); D6 (loss of income); D10 (payment and relief to others); and D10 (other). A full description of the methodologies is set out at paragraphs 103-380 of the "Report and recommendations Made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/1998/1). The Panel developed methodologies for the following loss types in part one of the second instalment: D2 (personal injury) and D5 (loss of bank accounts, stocks and other securities). These methodologies are described in the "Report and recommendations made by the Panel of Commissioners concerning part one of the second instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/1998/11), at paragraphs 30-57. The Panel developed the methodology for D4 (personal property) losses in part two of the second instalment. This methodology is described in the "Report and recommendations made by the Panel of Commissioners concerning part two of the second instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/1998/15), at paragraphs 30-68. The Panel developed the methodology for D7 (real property) losses in part two of the fourth instalment. This methodology is described in the "Report and recommendations made by the Panel of Commissioners concerning part two of the fourth instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/2000/11), at paragraphs 30-68. The "D2" Panel of Commissioners developed the methodology for D8/D9 (business loss) claims, which is described in the "Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/2000/24). The methodologies for resolving all of the losses in category "D" have now been developed.

4/ See in particular chapter II of the "Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US$100,000 (Category 'D' Claims)" (S/AC.26/1998/1) and chapter IV of the "Report and recommendations made by the Panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$100,000 (Category 'D' Claims)" (S/AC.26/1998/3).

5/ S/AC.26/1998/1.

6/ See chapter VI of the "Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US$100,000 (Category 'D' Claims)" (S/AC.26/1998/1) and chapter II of the "Report and recommendations concerning part two of the first instalment of individual claims for damages above US$100,000 (Category 'D' Claims)" (S/AC.26/1998/15). These two reports were approved by the Governing Council in decision 47 (S/AC.26/Dec.47 (1998)) and decision 49 (S/AC.26/Dec.49 (1998)), respectively. See also paragraph 8 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) which provides that "[S]ince ... [category D] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss". See also articles 35(1) and (3) of the Rules.

7/ See paragraph 134 of the "Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of individual claims for damages above US$100,000 (Category 'D' Claims)" (S/AC.26/2000/24).

8/ See paragraph 21 of the "Report and recommendations made by the Panel of Commissioners concerning part one of the fourth instalment of individual claims for damages above US$100,000 (category 'D' claims)" (S/AC.26/1999/21).

9/ See paragraph 39 of the "Report and recommendations made by the Panel of Commissioners concerning the third instalment of individual claims for damages above US$100,000 (category 'D' claims) (S/AC.26/1999/9).

10/ Paragraph 1 of decision 16 (S/AC.26/1992/16) states that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." See also paragraphs 64-65 of the report for part one of the first instalment (supra note 2).

Annex

SUMMARY RECOMMENDATIONS OF PART TWO OF THE NINTH INSTALMENT OF CATEGORY "D" CLAIMS

Country or international organization	Number of claims recommended for payment	Number of claims not recommended for payment	Amount of compensation claimed (USD)	Amount of compensation recommended (USD)
Australia	2	0	530,349.82	111,818.49
Canada	2	1	582,920.00	132,142.80
France	1	1	1,590,109.04	14,459.52
India	11	9	3,986,953.69	308,912.61
Ireland	2	0	436,683.67	132,322.42
Israel	1	0	1,250,000.00	379,464.81
Jordan	42	16	27,021,929.20	4,016,752.18
Kuwait	108	7	52,481,306.41	35,653,364.49
Pakistan	5	0	1,216,814.67	285,941.42
Sudan	7	0	3,405,391.30	483,301.97
Sweden	1	2	1,119,657.81	30,000.00
Syrian Arab Republic	7	6	2,123,665.62	621,027.36
United Kingdom	7	7	1,900,025.02	534,935.46
United States of America	1	2	796,622.36	75,772.50
Yemen	1	0	362,768.17	61,721.68
UNDP Washington	1	0	188,317.00	25,898.00
UNHCR Canada	0	2	6,075,000.00	0.00
UNRWA Gaza	3	0	523,889.27	125,588.84
Total	202	53	105,592,403.05	42,993,424.55